Public Prosecutor v Loh Kah Loon

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–84 OF 2007
TENGKU BAHARUDIN SHAH, ZAINUN ALI AND ABU SAMAH JJCA
4 JULY 2008

Criminal law — Dangerous Drugs Act — s 39B — Trafficking — Knowledge — Deliberate act of throwing offending substance — Whether give rise to inference of knowledge and custody and control of drugs — Whether presumption of trafficking triggered

Criminal law — Dangerous Drugs Act — s 39B — Trafficking — Whether proved — Whether possession independent from presumption under s 37(d) proved — Whether trial judge erred in reducing charge of trafficking to possession

Acting on information received, ASP Charun ('SP3') and his men approached the respondent, while in a parked car. Upon identifying himself as a police officer to the respondent, the respondent sped off and the police vehicles gave chase. During the chase SP3, SP5 and SP6 saw the respondent throwing a plastic bag, exh P6, out of the driver's window which was found to contain two packets of methamphetamine ('the drugs'). The respondent, who was originally charged with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), was subsequently convicted of an amended charge which was punishable under s 39A(2) of the DDA, to which he pleaded guilty. Hence this appeal by the prosecution against the decision of the judicial commissioner ('JC') amending the original charge to one of possession. The prosecution contended that the learned JC failed to consider that the prosecution had sufficiently established that the respondent was in possession of the drugs independent of the presumption under s 37(d) of the DDA, and had thus misdirected himself.

Held, allowing the appeal:

(1) The respondent's act of throwing P6 out of the car while being chased by the police vehicles was a deliberate act of a person caught red handed trying to distance himself from the offending substance that he knew he

had with him. Although surprised by the police approach, but its effect were long gone and might have so acted in panic but not for lack of knowledge of its contents. The drugs were neither locked nor concealed in P6 and were in fact contained in transparent plastic packets which contents required little effort on his part to discover. The respondent's conduct in the circumstances aforesaid can have no other inference but of his knowledge and guilt (see paras 13 & 14).

(2) On the facts, the learned JC after having rightly made a finding of fact on custody and control of the drugs, had misdirected himself in relying on *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 and similar cases which facts were totally distinguishable. On the proven facts of the case he should have made a finding of possession independent of the presumption under s 37(d) of the DDA and with the amount of the drugs recovered being more than twice that prescribed under s 37(da)(xvi) of the DDA, the presumption of trafficking was triggered. Therefore, the respondent's defence ought to have been called on the original charge proferred against him (see paras 10 & 16).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diterima, ASP Charun (SP3) dan orang-orangnya menghampiri responden, semasa dia berada dalam kereta. Sebaik sahaja SP3 memperkenalkan dirinya sebagai pegawai polis, responden cabut lari dan polis kemudiannya mengejarnya. Semasa kejar mengejar itu, SP3, SP5 dan SP6 nampak responden membuang satu beg plastik, eks P6, melalui tingkap bahagian pemandu dan plastik beg itu didapati mengandungi dua paket methamphetamine ('dadah tersebut'). Responden, yang pada asalnya dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), kemudiannya disabitkan atas pertuduhan pindaan yang boleh dihukum di bawah s 39A(2) ADB, yang mana dia mengaku bersalah. Maka rayuan oleh pihak pendakwa raya ini adalah terhadap keputusan pesuruhjaya kehakiman ('PK') yang meminda pertuduhan asal kepada kesalahan memiliki. Pihak pendakwa raya berhujah bahawa PK yang bijaksana gagal mempertimbangkan bahawa pihak pendakwa raya berjaya membuktikan bahawa responden memiliki dadah, tanpa perlu bergantung kepada anggapan di bawah s 37(d) ADB dan telah salah arah.

Diputuskan, membenarkan rayuan:

(1) Tindakan responden membuang P6 dari keretanya semasa dikejar oleh kenderaan polis menunjukkan tindakan yang disengajakan oleh

seseorang yang terang-terangan ditangkap kerana cuba untuk menjauhkan dirinya daripada bahan salah yang sememangnya ada padanya. Walau pun terperanjat dengan kehadiran polis, kesannya telah lama hilang dan mungkin bertindak kerana panik dan bukannya kerana tidak tahu isi kandungannya. Dadah tersebut bukannya terkunci atau pun terselindung dalam P6, malah berada dalam paket plastik lutsinar. Responden boleh nampak dengan senang isi kandungannya. Tindakan responden dalam keadaan sebegitu tidak boleh mempunyai inferens lain kecuali pengetahuan dan rasa bersalahnya (lihat perenggan 13 & 14)

(2) Melihat kepada fakta-fakta, setelah memutuskan dengan betul penemuan fakta atas jagaan dan kawalan dadah tersebut, PK yang bijaksana telah tersalah arah apabila mengguna pakai kes *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 dan kes-kes serupa yang mana fakta-faktanya sangat berbeza. Atas fakta-fakta yang telah terbukti dalam kes ini, dia seharusnya memutuskan pemilikan tanpa perlu bergantung kepada anggapan di bawah s 37(d) ADB dan melihat kepada jumlah dadah yang dijumpai adalah berganda daripada jumlah yang ditetapkan di bawah s 37(da)(xvi) ADB, menimbulkan anggapan mengedar. Oleh itu, pembelaan responden seharusnya terhadap pertuduhan asal yang dikemukakan terhadapnya (lihat perenggan 10 & 16).]

Notes

For cases on s 39B of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 263–307.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (distd)
Chan Pean Leon v PP [1956] MLJ 237 (folld)
DPP v Brooks [1974] All ER 840 (refd)
Liew Chee Hong v PP [2005] 6 CLJ 702 (distd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1 (folld)
PP v Tan Tatt Eek [2005] 2 MLJ 685 (refd)
Reza Mohd Shah bin Ahmad Shah v PP [2006] 2 MLJ 223 (refd)
Roslan bin Sabu @ Omar v PP [2006] 5 MLJ 244 (distd)
Tai Chai Keh v PP (1948–1949) MLJ 105 (refd)
Taib bin Mohamad v PP [2002] 3 MLJ 476 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 37(da)(xvi), 39A(2), 39B(1)(a)

Appeal from: Criminal Trial No 45–62 of 2003 (High Court, Johor Bahru)

K Mangai (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondent.

Tengku Baharudin Shah JCA:

[1] This is an appeal by the learned public prosecutor against the decision of the learned judicial commissioner ('JC') at the High Court in Johor Bahru amending the original charge of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') to one of possession punishable under s 39A(2) at the close of the prosecution's case against the respondent who was then, on his own plea of guilt, convicted of the amended charge and duly sentenced.

[2] The main complaint of the learned deputy here is against the learned JC's failure to consider that the prosecution had, on the evidence adduced at trial, sufficiently established that the respondent was in possession of the drugs independent of the presumption under s 37(d) of the DDA. It was submitted that the learned JC correctly found the respondent in custody and control of the plastic bag P6, which he threw out of the car he was driving while being chased by the police, but wrongly held that the respondent did not have the requisite knowledge of the drugs contained therein. He had invoked the statutory presumption of possession though evidence of actual possession of the drugs had been proved against the respondent. The amount of the drugs so found in the respondent's possession would have triggered the presumption of trafficking under s 37(da) of the DDA. He is thus alleged to have misdirected himself when he reduced the charge as he did.

[3] The following facts of the case are basically not in dispute. Acting on information received ASP Charun (SP3) and his men in two vehicles went to Taman Desa Jaya, Johor Bahru. Upon arrival there they saw the target car, a white Kancil, parked by the road side with the driver, subsequently identified as the respondent, being the only occupant. SP3's vehicle stopped near the Kancil and SP3 got out of the car, approached the respondent and identified himself as a police officer. The Kancil suddenly sped off and the two police vehicles gave chase. During the chase SP3 saw, as did SP5, who was driving him, and SP6 in the police van following behind, the respondent throwing something out of the driver's window on to the road divider. On SP3's direction through the walkie talkie SP6 recovered that something, a green and while plastic bag P6, which was handed to SP3 when he came back to the spot after the respondent's arrest. P6 was found to only contain two

transparent plastic packets of some crystal like substance which, when subsequently analysed by the chemist SP2, was confirmed to contain 115.54g of methamphetamine, the subject of the charge (the drugs). Possession of 50g or more in weight of methamphetamine would trigger the presumption of trafficking under s 37(da)(xvi) of the DDA.

[4] The trial court found itself only faced with two issues at the close of the prosecution ie whether there was any doubt as to the identity of the exhibit recovered and whether the respondent had mens rea possession of the drugs. Our concern in this appeal therefore is only with the second question which the learned JC answered in the negative. Though he agreed with the prosecution that, based on the evidence adduced, the respondent had custody and control of the drugs, he felt the need to further consider whether there was evidence to infer that the respondent had the requisite knowledge and on the available evidence found he did not.

[5] On the uncontroverted facts before the court, the learned deputy's complaint is not unjustified as there is ample evidence adduced for the court, in the absence of possible explanation, to draw an irresistible inference that the respondent knew about the drugs and hence had them in his possession. The following oft-quoted passages from the judgment of Thomson J (as he then was) in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, at p 239 bear repetition as to the meaning of possession in criminal law:

> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> It must be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*.
>
> … it must be clear that the circumstances in which it is found shew such an intention … But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so …

[6] Applying that to the circumstances of this case, there can be no doubt that the respondent being the only person in the car was so situated with respect to the drugs in P6 that he had the power to deal with them as owner to the exclusion of all other persons, and was circumstanced that he may not only intend to deal with them when he saw the occasion to do so, but did in fact do so by disposing the same when he physically threw P6 out of the window of the moving car.

[7] The Federal Court in the most recent case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1 held that from the evidence adduced in that case that the respondent was the only person in the car at the material time, the drugs were found hidden under the driver's seat and front passenger seat, and PW8's evidence that the car was in the possession of the respondent for more that seven months prior to his arrest, in the absence of a plausible explanation from the respondent the irresistible inference to be drawn in the circumstances is that the respondent all along knew about the drug found in the car and that there was evidence of possession of the drug independent of s 37(d) of the DDA.

[8] It was indeed the contention of the learned deputy that on the facts of this case too, in particular, that the respondent was alone in the car at the material time, he sped off in his car upon SP3 introducing himself as a police officer, his act of throwing plastic bag P6 out of the car while being chased by the police and the fact that the drugs were wrapped in transparent plastic packets in unfastened P6, the trial court should have inferred that the respondent knew that P6 contained drugs. In the absence of any reasonable or plausible explanation by the respondent these facts are sufficient for the court to find him to be in possession of the said drugs independent of s 37(d).

[9] We find no cause to disagree. If the Federal Court found the inference of knowledge irresistible in the absence of any overt act on the part of the respondent in *Abdul Rahman bin Akif* there is no reason why the trial court could not find the inference of knowledge irresistible in this case when the respondent had undoubtedly by his overt act assumed control of P6 which only contain the drugs. To quote Lord Morris in his judgment in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 cited in *Abdul Rahman bin Akif*:

> If, however, someone deliberately assumes control of some package or container, then I would think he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it.

[10] On behalf of the respondent learned counsel submitted that there was no misdirection by the trial court as the prosecution was relying on the respondent's conduct — see *Liew Chee Hong v Public Prosecutor* [2005] 6 CLJ 702. Echoing the reasoning of the learned JC he said the fact that the respondent sped off when confronted by police did not mean he had guilty knowledge. The court took guidance from *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 and *Tai Chai Keh v Public Prosecutor* [1948–1949] MLJ 105 in holding that such conduct was also consistent with

innocence as the respondent probably panicked upon being approached by a police officer in plain clothes. It was also maintained that the act of the respondent throwing out P6 during the chase was correctly held to be capable of more than one inference as the respondent did not have the exclusive use of the car which belonged to his mother SP1. Counsel emphasised that it was so held in similar situation by this court in *Redza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223 and by the FC in *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685. It was also submitted that in view of conflicting decisions of the apex court on the issue, the trial court was free to choose which ever appropriate higher authority to follow.

[11] In *Liew Chee Hong* the learned trial judge found the appellant to be in possession of the drug with knowledge being inferred from his own conduct in throwing it out of his motorcycle and attempting to escape while the police tried to apprehend him. In the same breadth it was also held that such conduct of the appellant could also be imputed to his reaction when taken by surprise which conduct would not then infer knowledge of the drug being carried. The learned judge there clearly misdirected himself in that after having found the facts of the case to admit more than one inference he chose to adopt, contrary to *Tai Chai Keh*, the inference that was not favourable to the appellant. It was for that reason that the conviction for trafficking could not be supported on appeal and was set aside to be substituted with a conviction for possession which was presumed under s 37(d) of the DDA. The circumstances are not the same in our case.

[12] *Abdullah Zawawi*, relied on by the learned JC, is clearly distinguishable on its facts. There, the house occupied by the accused, his wife, their children and another man was raided by a police party on information received. Their search revealed nothing incriminating until they came to a locked almeira. When they asked the accused for the key he said it was with his wife and called out to her who was outside the house. She hurriedly came up, fetched the key and opened the almeira wherein were recovered a box containing dangerous drugs. The accused took to his heels upon the police announcing the discovery of the said drugs. He was convicted of trafficking while his wife was acquitted. On appeal, the Federal Court made the observation that such conduct of the accused was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand, it was conduct equally consistent with the accused having been in a state of pure panic, bearing in mind that he took to his heels only *after* (emphasised) the discovery of the drugs was announced. It was explained that an innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. In our case, unlike in *Abdullah Zawawi*, the respondent took off immediately upon being made aware of police presence and well before the

drugs were discovered. As pointed out by learned deputy, the Federal Court in that case put emphasis on the word *after* in distinguishing its decision from that of the Privy Council in the Jamaican case of *Deputy Public Prosecutor v Brooks* [1974] All ER 840 cited by the prosecution where the accused who occupied the driver's seat of the van containing 1000 lbs of ganja together with several others scrambled out of the van and ran off when police officers hurried towards the van before the drugs were discovered.

[13] The respondent's act of throwing P6 out of the car while being chased by the police vehicles is a deliberate act of a person caught red handed trying to distance himself from the offending substance that he knew he had with him. He might very well have been surprised by the police approach but its effect was long gone, and he might very well have so acted in panic but not for lack of knowledge of its contents but rather for fear of not being able to disassociate himself from its discovery if caught. He had no reason to throw it away if he was unaware of its presence or did not know it contained drugs. The drugs were neither locked nor concealed in P6 and were in fact contained in transparent plastic packets which contents required little effort on his part to discover. The respondent's conduct in the circumstances aforesaid can have no other inference but of his knowledge and guilt. For the same reason what happened here is factually distinguishable from that in the other cases cited by the learned trial JC to support his finding.

[14] In any event, knowledge like intention is a mental element of the state of mind of a person. It cannot be proved by direct evidence. Short of an admission it can only be proved by inference from the surrounding circumstances or judged from a person's outward acts or omissions. It is the cumulative effect of such circumstances or demeanour that would determine whether or not the requisite knowledge can be irresistibly inferred. While the respondent might have reasonably taken flight upon being surprised by the approach of the police for whatever reason, his subsequent conduct of throwing P6 out of the car during the chase evidences his deliberate act of asserting exclusive control over it (including its only contents) which necessarily infers his knowledge of the presence of the drugs for otherwise he would not have seen the need to distant himself from them by getting rid of them when he had the opportunity to do so. In similar situation (except for the act of throwing preceding the flight) this court in *Roslan bin Sabu @ Sabu v Public Prosecutor* [2006] 5 MLJ 244 held that the fact the appellant could see the illicit drugs contained in the two transparent plastic bags he was carrying was sufficient to satisfy the mens rea element of possession. That conclusion coupled with his act of throwing away the two bags and running off after being ordered to stop led to the only inference that could be drawn,

which is that he knew he was carrying illicit drugs. *Public Prosecutor v Tan Tatt Eek* and *Taib bin Mohamad v Public Prosecutor* [2002] 3 MLJ 476 were distinguished therein on the facts.

[15] The question of conflict of authorities and of the trial court having the choice of which decision to follow are matters which must be left to another occasion. They are not relevant for our consideration nor were they relied on or considered by the trial JC.

[16] In the upshot, we find that the learned trial JC after having rightly made a finding of fact on custody and control of the drugs misdirected himself in relying on *Abdullah Zawawi* and similar cases which facts are totally distinguishable. On the proven facts of this case he should have made a finding of possession independent of the presumption under s 37(d) of the DDA and with the amount of the drugs recovered being more than twice that prescribed under s 37 (da)(xvi) of the DDA, the presumption of trafficking was triggered. The respondent's defence ought to have been called on the original charge proferred against him.

[17] Accordingly, the appeal was allowed and the conviction and sentence set aside. The case was remitted back to the High Court for the accused's defence to be called on the original charge under s 39B(1)(a) of the DDA.

Appeal allowed.

Reported by Augustine Soosay